**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION No. 22382 of 2005**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE AKIL KURESHI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**MULTIMEDIA FRONTIERS LTD. - Petitioner(s)**
**Versus**
**TIKOO TRADERS PVT.LTD. - Respondent(s)**

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**Appearance :**
MR NAVIN K PAHWA for Petitioner(s) : 1,
MR KUNJAL D PANDYA for Respondent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**

**Date : 23/03/2007**

**ORAL JUDGMENT**

1. Heard learned advocate Ms. Sangeeta Pahwa for the petitioner. No one is present for the respondent.

2. In this petition, the petitioner has challenged the legality of an order dated 12th July, 2005 passed by the Principal Senior Civil Judge, Gandhinagar below exh. 6 and 20 in Summary Suit No.30/2004.

3. The present petitioner was the original defendant in Summary Suit filed by the respondent herein. The respondent had filed the Summary Suit seeking recovery of sum of Rs.20,26,749/- with interest at the rate of 12% per annum from the petitioner herein. The case of the respondent original plaintiff broadly stated was that there were certain business transactions between the parties; that the plaintiff was maintaining regular accounts and that despite reminders and correspondence, the original defendant had failed to clear the accounts. The original plaintiff is therefore, compelled to file the said summary suit before the trial Court.

4. On the other hand, defence of the defendant petitioner herein was that accounts do not reflect the correct picture. The defendant also raised doubt about any amount being outstanding from the defendant to the plaintiff. In fact, in the affidavit in support of the application for leave to defend, it was urged that the plaintiff is not entitled to receive any sum from the defendant. It was also contended that the

plaintiff cannot claim any interest from the defendant. The defendant also set up a counter claim against the plaintiff.

5. The trial Court however, did not accept the stand of the defendant petitioner herein. By the impugned order, trial Court refused leave to defend sought for by the defendant. Summons for judgement was allowed. The defendant was directed to pay Rs.20,26,749/- with interest at the rate of 12% per annum from the date of suit till realisation.

6. Before this Court the defendant has therefore, challenged the said judgement and contended that the trial Court committed serious illegality and jurisdictional error in rejecting the triable issues and bona fide defences of the petitioner. It was contended that summary suit itself is not maintainable. Reliance in this regard is placed on the provisions contained in Rule 1 of Order 37. In particular, my attention was drawn to clause(b) of Sub-rule 2 of Rule 1 of Order 37 which reads as follows :

"(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest arising,-
(i) on a written contract; or
(ii) on an enactment, where he sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
(iii)on a guarantee, where the claim against the principal is in respect of a debt or liquidated

demand only.”

7. On the basis of said provisions contained in Sub-rule(2) of Rule-1 of Order 37, it was contended that suit which is based on settlement of account is not maintainable as summary suit.

8. It was also contended that defendant had raised number of triable issues. The defence of the defendant was certainly not sham or bogus. It was therefore, contended that Court should have permitted unconditional leave to defend.

9. In this regard reliance was placed on the decision of the Apex Court in the case of **M/s. Mechalec Engineers & Manufacturers v. M/s. Basic Equipment Corporation** reported in AIR 1977 Supreme Court 577 wherein the Apex Court made following observations :

> 8. In S. Kiranmoyee Dassi v. Dr. J. Chatterjee, (1945) 49 Cal WN 246 at p. 253, Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37, C.P.C. in the form of the following propositions (at p. 253):
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> "(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.
>
> (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

10. It was further contended that in the affidavit filed by the defendant, number of factual disputes were raised. The averments of the plaintiff made in the claim petition were denied. No rejoinder was filed by the plaintiff denying the assertions of the defendants that the accounts do not reflect the true and correct picture and that no money is outstanding from the defendant to the plaintiff. It was urged that therefore, the Court ought not to have decreed the suit and instead ought to have

granted unconditional leave to defend.

11. Having heard learned advocate for the petitioner, I find that the trial Court materially erred in decreeing the suit though sufficient explanation given by the petitioner and there were triable issues. By no stretch of imagination can it be said that defence of the petitioner was either sham or completely bogus.

12. The question whether the summary suit was maintainable itself or not would be one of the relevant question. In addition thereto, I also find that plaintiff filed no rejoinder to the reply statement of the defendant. In the reply statement, defendant had raised number of factual disputes. If all these issues are to be tried, same can be done only in a regular suit and straightway decree cannot be passed. In my view therefore, trial Court committed jurisdictional error in rejecting the request of the defendant to permit the defendant to defend the suit.

13. In a recent decision in the case of **Defiance Knitting Industries(P) ltd. v. Jay Arts** reported in (2006) 8 Supreme Court Cases 25, the Apex Court reiterated the legal decision in this regard in following terms :

“13. While giving leave to defend the suit the court shall observe the following principles :

(a) If the court is of the opinion that the case raises a triable issue then leave to defend should ordinarily be granted unconditionally. See Milkhiram(India)(P) Ltd. v. Chamanlal Bros. The question whether the defence raises a triable issue or not has to be ascertained by the court from the pleadings before it and the affidavits of parties.

(b) If the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious it may refuse leave to defend altogether. Kiranmoyee Dassi v. Dr. J. Chatterjee(noted and approved in Mechelec case).

(c) In cases where the court entertains a genuine doubt on the question as to whether the defence is genuine or sham or whether it raises a triable issue or not, the court may impose conditions in granting leave to defend.”

14.From the above discussion, it can be seen that when the defendant had raised triable issues, the defendant was entitled to unconditional leave to defend the suit.

15.Under the circumstances, petition is allowed. Impugned order dated 12th July, 2005 is quashed. The petitioner shall have unconditional leave to defend the suit.

16.With these directions, petition is allowed. Rule made absolute.

(Akil Kureshi,J.)

(raghu)